In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1012

ARTHUR J. FISHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1967. The petition for a writ of certiorari was filed on January 12, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a statement made by petitioner to government agents at his place of employment was properly admitted into evidence.

2. Whether the information under which petitioner was charged was duplicitous.

290-593—68

3. Whether the evidence was sufficient to support the conviction.

4. Whether the instruction on character evidence was proper.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of violating 29 U.S.C. 186(b) by receiving equipment and materials from an employer at a time when petitioner was an officer, employee and representative of a labor organization which represented employees of that employer. The district court suspended imposition of sentence and placed petitioner on probation for one year.

1. In 1964 and 1965, petitioner was the financial secretary of Local 137, International Union of Operating Engineers (Tr. 154) and was in charge of collecting union dues. He also served on the executive board of the union, which had the power to review the acts of the official who conducted the daily affairs of the local (Tr. 857, 862–863, 865). Petitioner was employed as a master mechanic by Camarco Contractors, Inc., a company which employed members of Local 137, and was the person with whom the employer communicated about grievances with employees of the local (Tr. 168–170, 172, 175).

In the spring of 1964, petitioner began to build his own house (Tr. 42). Between March 1964 and June 1964, petitioner received from Camarco large quantities of sand, gravel, crushed stone, cement and concrete and the use of concrete forms and a front-end loader (see *e.g.*, Tr. 30–31, 132–133). Contrary to its

usual practice, Camarco prepared no business records of these transactions and did not bill petitioner (Tr. 261–263, 270–273, 276, 318–319). In May, 1965, subsequent to the start of the government's investigation into these transactions, Camarco prepared an invoice purporting to cover the deliveries to petitioner (Tr. 273–275).

2. On April 8, 1965, two FBI agents went to the Camarco job site where petitioner worked. They interviewed him for about 35 to 40 minutes in their automobile but did not arrest or otherwise restrain petitioner (Tr. 326–327, 336–337). At the outset of the interview, petitioner was admonished that he and Camarco were under investigation, that he did not have to make any statement, that he had a right to consult an attorney of his choice and that any statement that he made could be used against him in a court of law (Tr. 327–328, 330–331, 348). Petitioner advised the agents that he did not know whether he was ever going to be billed for the materials that he had received or whether the materials were gratuitous (Tr. 350–351). During the interview, petitioner called over a Camarco official to explain the deliveries of concrete (Tr. 351–352). The trial judge admitted petitioner's statement into evidence, rejecting petitioner's argument that he had not been adequately admonished about the privilege against self-incrimination and the right to counsel (Tr. 345–346).

ARGUMENT

1. Although petitioner was interviewed by the FBI agents prior to this Court's decision in *Miranda* v.

United States, 384 U.S. 436, the warnings which he was given met the requirements of that decision. He was clearly informed that he did not have to make a statement and that he had a right to consult an attorney of his choice. Since his salary was $450 a week, the fact that the agents did not inform him that counsel could be appointed to represent him carries no significance. Moreover, petitioner was not taken into custody or otherwise deprived of his freedom of action. The brief interview at the site where he worked was obviously quite different from the in-custody interrogation to which the *Miranda* decision was directed. In these circumstances, petitioner's statements were properly admitted into evidence.[1]

2. The information charged petitioner with illegally receiving material in violation of 29 U.S.C. 186(b) at a time when he was "an officer, employee and representative of a labor organization."[2] In the bill of particulars the government stated that it would show that petitioner was "an officer of Local 137, International Union of Operating Engineers, to wit, Financial Secretary of said Local." After all the evidence had been presented, petitioner, for the first time,

[1] The claim that the initial answers of the FBI agent on voir dire examination concerning the warning given differed from his subsequent answers is refuted by the record (Tr. 327–328, 330–331, 338–339).

[2] That section makes it unlawful for any person to receive anything of value prohibited by section 186(a) which in turn makes it a crime (in subsection (a)(1)) for an employer to give anything "to any representative of any of his employees" and (in subsection (a)(2)) for an employer to give anything to "any labor organization, or any officer or employee thereof, which represents * * * employees of such employer * * *."

attacked the information on the ground that it was duplicitous because it charged him as both an officer and a representative (Tr. 1084–1088). Whatever the validity of *United States* v. *Donovan,* 339 F. 2d 404 (C.A. 7), upon which petitioner relies, it is inapplicable to this case. Here, petitioner was not remotely prejudiced by the wording of the information since the bill of particulars clearly informed him in which official capacity he was charged. At all events, any objection to an information on the ground of duplicity must be raised prior to trial. Rule 12(b)(2) F.R. Crim. P.; *United States* v. *Galgano,* 281 F. 2d 908, 911 (C.A. 2), certiorari denied *sub nom. Carminati* v. *United States,* 366 U.S. 960.

3. The evidence amply supports the conviction. Petitioner, as the financial secretary of the local and a member of its executive board, was clearly an "officer" representing "employees of such employer" within the meaning of the statute. It was, therefore, not necessary, as petitioner argues, that the government show that his position included some activity that would enable him as an "officer to commit the unfaithful acts of selling out the union" (Pet. 12). Moreover, petitioner could have betrayed the other employees both in his role as a member of the executive board and in his role as the person with whom the employer communicated in order to resolve grievances with members of the local. The issue of whether the materials were a gift or a sale was for the jury to resolve.

4. The trial court instructed the jury that evidence of good character was to be considered with all the

evidence in the case in determining petitioner's guilt or innocence; that the jury should give it such weight as it deemed warranted under all the facts and circumstances; and that such evidence, "when considered with all the other evidence in the case, may in itself be such to raise a reasonable doubt" as to the defendant's guilt (Tr. 1213). This was a proper instruction. See *United States* v. *Crosby*, 294 F. 2d 928, 948 (C.A. 2), certiorari denied *sub nom. Mittelman* v. *United States*, 368 U.S. 984.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

FEBRUARY 1968.